IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.1958 of 2004

Mustaq S Kathawalla and ors .. Petitioners.

Vs

Mrs Shaheeda Upletawala and anr. Respondents

Mr R.D.Soni i/b M/s Khaitan and Jayakar for the petitioners

Mr Subodh Desai with Mr. M Shukla i/b
M/s Desai and Diwanji for respondent No.l
Mr Manoj M Mhambry APP for the State .

CORAM: H.S. BEDI, C.J. ,

DATE: December 1, 2006.

P.C.:-

This petition has been filed seeking to quash the proceedings initiated against the petitioners under FIR No.3 of 1999 dated 19th November 1999 filed at the Gamdevi Police Station under sections 494, 495, 498A read with sections 114 and 34 of IPC. The complainant is Mrs Shaheeda Upletawala – respondent No. 1 herein. Petitioner No.1 was the husband of respondent No. 1 whereas Petitioner Nos. 2 and 3 were her in-laws.

2. As per the facts given in the petition a marriage between Mushtaq Shaifuddin Kathawala -Petitioner No.1 and one Ms Simran Ahuja was performed in the year 1982 under the provisions of the Special Marriage Act, 1954, and while this marriage was still subsisting, a second marriage between Petitioner No.1 and respondent No.1 herein took place in the year 1987 as per Muslim Law, which was dissolved thereafter. Petitioner No.1 married a third time (in the year 1999) with one Ms Alifiya Tambawalla. The case of the complainant is that at the time of her marriage in the year 1987 she was unaware that her husband had a subsisting marriage with Simran Ahuja and thus an offence under section 494 of IPC had been committed by him and his parents. In the complaint it was also alleged that Petitioner No.1 and his parents had ill-treated her and hence an offence under section 498A of IPC was also made out. The petitioners thereafter moved an application before the learned Magistrate for a discharge for the reasons mentioned therein. This application was dismissed by order dated 15th February 2003. A criminal revision application bearing No.243 of 2003 was subsequently filed against the aforesaid order which too has been dismissed with some relief for Petitioner Nos 2 and 3 by order dated 16th July 2004, Exhibit H, which is impugned in this petition. In the

order in revision it has been held that no case under section 498A IPC had been made out against Petitioner Nos. 2 and 3 and they have been discharged on that account. This petition has been filed by all the accused challenging the aforesaid order.

3. The learned counsel for the petitioners has argued that as the complainant was not a person aggrieved as per the provisions of section 494 of IPC read with sections 43 and 44 of the Special Marriage Act, the locus standi of the complainant to register an F.I.R. was suspect. It has been pleaded that as the complainant had not disputed that her marriage with Petitioner No. 1 in the year 1987 was a valid one, there was no question of the applicability of sections 494 and 498A of IPC in this situation. It has been finally argued that even if the facts mentioned in the FIR were taken as true, no case under section 494 of the IPC was made out against Petitioner Nos. 2 and 3, the aged parents of Petitioner No.1.

4. The learned counsel for respondent No. 1, has however, supported the impugned judgment.

5. Several issues have been raised before me, but I am of the opinion that at this stage it would not be appropriate to give a final decision in the matter in the light of the fact that evidence has not been led. It is clear from the record, however, that no allegation of any kind has been made against Petitioner Nos. 2 and 3 to bring them within the four corners of section 494 of IPC. The allegations against these petitioners made in paragraphs 13, 17 and 18 of the complaint are reproduced below:

> "13. I say that in the meanwhile, Tambawallas, who had tried to take forcible possession with the help of undesired elements and hirelings, tried to give their daughter in marriage of Mushtaq, my husband i.e accused No.1. In the meanwhile, I got an anonymous telephone call from a person, who refused to disclose his identity informed me that accused No. 1 had already married before my marriage with accused No.1 to one lady by name Simrat d/o one Ahuja, residing at Sea Croft Building, Behind Clover Apartments, Cuffe Parade Mumbai., The said caller also informed me that accused No.1

has married said lady Simrat under the Special Marriage Act, 1954, sometime in the beginning of 1982. The said person also informed me that the accused Nos 2 and 3 had full knowledge about this marriage of accused No. 1 with said Simrat d/o Ahuja. They also knew well that the said marriage was subsisting (i.e. Not dissolved). In spite of having full knowledge of the aforesaid facts and suppressing the same from me and my parents, they brought proposal of the accused No.1 to my father and with a view to cheat us, obtained our consent by fraud and misrepresentation and got me married to the accused No.1.

17.I further say that accused Nos. 2 and 3 who have fully aware of this fact, had not disclosed the same to any one and having kept silent about the said marriage under the Special Marriage Act, have conspired, aided and abated the accused No.1, have committed offence under section 494 of the Indian Penal Code. Thus

accused nos 2 and 3 are liable to be punished under section 494 of the Indian Penal Code.

18. I further say that accused Nos.1,2 and 3 knowing fully well that the accused no. 1 having married with said Simrat Ahuja and having concealed the said marriage have committed an offence under section 495 of the Indian Penal Code read with sections 114 or section 34 of the Indian Penal Code."

4. From a perusal of the aforesaid extracts it will be seen that the only general allegation have been levelled against the parents – Petitioner Nos. 2 and 3 which are that they had knowledge of the fact that Petitioner No. 1 had been married earlier in the year 1982. In my opinion mere knowledge would not be a ground or taken as a consent for the second marriage of Petitioner No.1 as he was not a young boy so as to be deeply influenced by his parents. In order to bring home an offence under section 494, something more than mere knowledge would be required and even assuming that the aged parents had accepted the marriage as a *fait accompli* it would still not lead to a tacit consent or approval to the second

marriage. I am, therefore, of the opinion that in so far as the proceedings against Petitioner Nos. 2 and 3 are concerned, they are required to be quashed. This petition is allowed to the above extent. It is however, made clear that notwithstanding this order it would be open to the parties to urge all points before the trial court.

CHIEF JUSTICE